Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93M-597
SEP 20 4 22 PM '93

In re Applications of	)	MM DOCKET NO. 93-107
	)	
DAVID A. RINGER	)	File No. BPH-911230MA
	)	
ASF BROADCASTING CORPORATION	)	File No. BPH-911230MB
	)	
WILBURN INDUSTRIES, INC.	)	File No. BPH-911230MC
	)	
SHELLEE F. DAVIS	)	File No. BPH-911231MA
	)	
OHIO RADIO ASSOCIATES, INC.	)	File No. BPH-911231MC
	)	
For Construction Permit for an FM Station on Channel 280A, in Westerville, Ohio	)	

MEMORANDUM OPINION AND ORDER

Issued: September 17, 1993 ; Released: September 20, 1993

1. Shellee F. Davis (Davis) seeks a ruling on a "Motion to Enlarge the Issues Against Wilburn Industries, Inc." She filed her motion on August 19, 1993, and wants the following financial issue added against Wilburn Industries, Inc. (Wilburn):

> "To determine whether Wilburn Industries, Inc. was financially qualified at the time its application was filed, and if not, the effect thereof on its basic qualifications to be a Commission licensee."

Davis filed an Errata to her motion on September 4, 1993.

2. Wilburn opposed Davis' motion on September 3, 1993, and filed an Errata to that Opposition on September 8, 1993. Davis replied on September 16, 1993.

Preliminary Ruling

3. Davis' motion is late-filed. Timely motions to enlarge should have been filed on or before May 24, 1993. See 47 CFR 1.229(b)(2), and 58 F.R.21580 published April 22, 1993.

4. Davis argues that her motion is timely. She says that Wilburn's principals were deposed on July 12, 1993,[1] and that the deposition transcripts became available on August 10, 1993. So, says Davis, her motion is based on the discovery of new facts and is timely filed under 47 CFR 1.229(b)(3).

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[1] The reason Wilburn's principals were deposed on July 12, 1993, is because that's when their opponents elected to depose them.

5. That argument is rejected. Almost all of her allegations have been available to Davis since December 30, 1991, when Wilburn filed their application. In any event automatic document production took place on May 10, 1993. So there is no excuse for Davis not having her financial allegations firmed up by June 9, 1993.[2] Davis is interminably late.

6. Davis had no right to wait until after depositions were taken before moving to enlarge against her opponent. In fact the Commission has specifically admonished her not to do so. See Discovery Procedures, 12 FCC 2d 185(1968) at para.7. This tactic of waiting until after discovery has been completed before filing motions to enlarge the issues is a procedure that should be discouraged. It prolongs hearings and frequently leads to two-phase or even three-phase hearings.[3]

Ruling

7. Since Davis' Motion is untimely, her allegations must be analyzed under the Commission's reassessed Edgefield-Saluda doctrine. See Adjudicatory Re-Regulation Proposals. 58 FCC 2d 865 (1976) and 47 CFR(c). There (at 873-876) the Commission said this:

> "An untimely motion to enlarge will be considered fully on its merits only if it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing. It is expected that this standard will be strictly construed."

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[2] Davis didn't file her enlargement request against Wilburn until after the parties had exchanged their direct case exhibits, and on the day before the Evidentiary Admission Session was held. So Davis is obviously fishing for a Phase II hearing.

[3] At the present time the adjudicatory processors (the Trial Judges, the Review Board, and the Adjudication Division of the General Counsel's office) are giving untimely post-designation petitions to enlarge issues the run-of-the-mill treatment. We seldom analyze such petitions as they should be analyzed; i.e., akin to an infrequent request for extraordinary relief. Consequently, the filing of untimely post-designation enlargement petitions has become a routine, almost automatic, practice. So we end up squandering judicial system resources, fostering adjudicatory inefficiency, and sanctioning trial by ordeal.

Our nonchalant processing of untimely enlargement requests obviously accrues to the tactical advantage of the RAMBO litigator. It permits him to delay the outcome of the proceeding, and it gives him an additional bargaining chip at the settlement table.

Moreover, it must be remembered that granting an untimely petition to enlarge changes the basic fabric of the proceedings, reshapes the litigation, and alters the strengths and weaknesses of the parties involved. Adjudicatory processors would do well to give untimely petitions to enlarge the proverbial "hard look" before granting or denying them.

8. Giving Davis' allegations the strict construction they deserve they fail to pass muster. The record shows that Charles and Bernard Wilburn need $150,000 to construct and operate their proposal for 3 months without revenue. To meet that $150,000, Charles W. Wilburn has current assets of $300,000,[4] and his son Bernard P. Wilburn has $164,500[4]. Thus Davis has failed to raise any questions of probable decisional significance. Nor can it be said that her allegations raise any questions of such substantial importance that they warrant a Phase II hearing.

9. Even assuming Davis' allegations were timely filed, they would be rejected for any one of three reasons. First, and since her allegations are financial allegations, they must meet the standard laid down in Revised Processing Applications, 72 FCC 2d 202 (1979) at 222 (para.60.) As noted in para.8 and Footnote 4 supra. Wilburn Industries, Inc. is financially sound. And Davis has failed to show that Wilburn has misrepresented their finances or grossly omitted some decisionally significant financial item that would render their proposal totally defective.

10. Secondly, and even applying the less stringent standards of 47 CFR 1.229(d), Davis hasn't pleaded with the required sufficiency and specificity to warrant adding the issue she seeks.[5]

11. Finally, Wilburn has not only demonstrated that they are financially qualified to follow through on their proposal, they have also demonstrated that they made a good faith attempt to budget the costs of construction and operation of their station. The Wilburns' (father and son) ways and means of demonstrating their financial ability wasn't all we inside the Beltway expect of communications applicants. But they were sound ways and means, and unquestionably the Wilburns have the money needed to carry out their project.

SO the "Motion to Enlarge the Issues Against Wilburn Industries Inc." that Shellee F. Davis filed on August 19, 1993, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

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[4] Of these amounts, Charles Wilburn has $175,000 in cash and Bernard Wilburn has $39,500. Charles Wilburn has a net worth of over one-half million dollars and his son has a net worth of over one-quarter million dollars. Because of inexperience the Wilburns failed to perform all the rituals that we experienced communications people expect. But one thing is certain. The Wilburns have way more than enough money to carry out their Westerville project. They are financially qualified.

[5] 47 CFR 1.229(d) governs timely motions to enlarge. It provides in pertinent part that "[s]ugh motions shall contain specific allegations of fact sufficient to support the action requested. . ."